## Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–38–02 OF 2021
YAACOB MD SAM, ABU BAKAR JAIS AND CHE MOHD RUZIMA JJCA
7 APRIL 2022

*Criminal Procedure — Prosecution — Application to remove person from acting as senior deputy public prosecutor ('SDPP') — Attorney general/public prosecutor pursuant to s 376(3) Criminal Procedure Code appointed private lawyer ('GSR') to act as SDPP to lead prosecution of criminal charges against accused — Accused sought to remove GSR as SDPP on ground GSR had been involved in investigations behind the prosecutions and had also shown bias/prejudice against him — Whether accused had adduced tangible evidence to show GSR had actually been involved in investigations against him — Whether any prejudice or bias GSR might have revealed against accused was only privately made and before he was appointed SDPP — Whether accused's various allegations were mere conjecture — Whether there was no concrete evidence to show GSR would be unable to carry out his prosecution of accused professionally and without bias*

The instant appeal by the appellant ('Najib'), a former Prime Minister of Malaysia ('PM'), was against the High Court's dismissal of his application to challenge the appointment of a private lawyer ('GSR') as senior deputy public prosecutor ('SDPP') to prosecute him on several charges connected with a massive fraud involving the 1Malaysia Development Bhd ('1MDB'). While Najib was the PM, the then attorney general/public prosecutor ('MAA') had publicly cleared Najib of any wrongdoing in connection with the 1MDB scandal. However, following a change in government and a new PM coming to power, the attorney general who replaced MAA ('TT') initiated several criminal prosecutions against Najib. Pursuant to s 376(3) of the Criminal Procedure Code, TT by letter appointed GSR, an ex-Federal Court judge, to take charge of the prosecutions against Najib. Najib objected to the appointment on the grounds that: (a) GSR had been involved in the investigations behind the prosecutions as evident in the contents of GSR's letter of appointment and a media statement issued by the Attorney General's Chambers ('AG's Chambers') regarding the appointment; and (b) GSR had shown bias and prejudgment of Najib's guilt. To support this allegation, Najib referred to a meeting that GSR (while accompanied by another lawyer named JR Tey) had had with MAA during which GSR had allegedly tried to convince MAA to arrest Najib on charges of embezzlement of 1MDB funds, corruption and fraud. Najib had also relied upon a telephone message between MAA and GSR in which GSR had allegedly used the term 'criminal Najib'. In reply to the

accusations, GSR said he was never directly involved in any investigations against Najib and that it was absurd for MAA to suggest that he could have asked MAA, who was then the attorney general, to arrest a sitting PM, namely, Najib. GSR said whatever transpired in his meeting with MAA was before he was appointed as the SDPP and therefore could not be used to smear his subsequent professional and unbiased conduct of the prosecutions. GSR said the various allegations Najib had raised in support of his application amounted to nothing because ultimately it was TT who was in overall control of the prosecutions and it was the Court which ensured that Najib had a fair trial. In dismissing Najib's application to remove GSR, the High Court judge found: (i) no evidence to show that GSR had actually investigated cases where he was required to prosecute Najib; (ii) that the meeting between MAA and GSR took place before GSR was appointed as the SDPP and whatever opinion GSR might have expressed about Najib then was privately made; (iii) that GSR's version of events did not need corroboration by JR Tey; and (iv) that Najib's prosecution was a team effort by the AG's Chambers and was not absolutely in GSR's control.

**Held**, unanimously dismissing the appeal:

(1) Although GSR's letter of appointment and the AG's Chamber's media release concerning GSR's appointment clearly indicated that GSR was to be involved in the investigation of the 1MDB cases, no credible, tangible evidence was adduced by Najib to show that GSR was actually involved in the investigations against him (see paras 50–51 & 53).

(2) Even if the alleged conversation that took place between MAA and GSR at the former's house was true, it did not mean that GSR was biased to the point that he could not be objective in prosecuting Najib. GSR might have wished for Najib to be prosecuted but there was nothing much he could do at that point of time because the decision to prosecute was in the hands of the AG who, at that time, was MAA. It was pointless for GSR to be biased then. And even if he was biased, it was irrelevant because GSR was not the SDPP then (see paras 58 & 70)

(3) The High Court was correct in holding that GSR was entitled to have his own private opinion about Najib. As long as his private opinion was not in the public sphere, it would not infringe his public duty in prosecuting Najib. Even if GSR still considered Najib as 'criminal', his perception of Najib would not carry him far in court as counsel on both sides of the divide were subject to the close scrutiny of the trial judge who would stem any exercise of bias by either side (see paras 59–60).

(4) The assertion by GSR on his version of what transpired at MAA's house could be independently assessed and evaluated without the need for corroboration by JR Tey. The High Court judge did precisely that and found that it was sufficient for the versions put by the parties in their

respective affidavits to be analysed against the circumstances of the case. Unless it could be shown that the judge was not entitled to do so, there was no reason to disturb his findings (see paras 62 & 64–65).

(5) The court agreed that Najib's instant application was not an abuse of process as the present application was based on new facts that were not available to Najib when he made a previous application to remove GSR, which was dismissed by the court (see paras 67–68).

(6) Najib had failed to justify GSR's removal as the SDPP. The court found that GSR was never involved in the investigations against Najib. It was also not proven that GSR was biased at the relevant point of time and even if he was biased before he was appointed as the SDPP, it was not relevant. Neither could Najib prove that GSR had the possibility of being biased against him in future. The court did not think that GSR could not be objective in his capacity as the SDPP in prosecuting Najib (see para 70).

**[Bahasa Malaysia summary**

Rayuan ini difailkan oleh oleh perayu ('Najib'), mantan Perdana Menteri Malaysia ('PM'), terhadap keputusan Mahkamah Tinggi yang menolak permohonannya untuk membatalkan pelantikan peguam swasta ('GSR') sebagai timbalan pendakwa raya kanan ('TPRK') untuk menjalankan tugas pendakwaan terhadap beberapa pertuduhan frod secara besar-besaran melibatkan 1Malaysia Development Bhd ('1MDB'). Semasa Najib menjadi PM, peguam negara/pendakwa raya ('MAA') ketika itu telah melepaskan Najib daripada apa-apa salah laku berkaitan dengan skandal 1MDB. Walau bagaimanapun, berikutan perubahan kerajaan dan pertukaran PM yang baru, peguam negara yang menggantikan MAA ('TT') melakukan proses pendakwaan terhadap Najib. Menurut s 376(3) Kanun Tatacara Jenayah, TT melalui surat telah melantik GSR, bekas hakim Mahkamah Persekutuan, untuk mewakili pendakwaan terhadap Najib. Najib membantah pelantikan tersebut atas alasan bahawa: (a) GSR telah terlibat di dalam siasatan pendakwaan seperti yang terbukti dalam kandungan surat pelantikan GSR dan kenyataan media yang dikeluarkan oleh Jabatan Peguam Negara ('Jabatan Peguam Negara') mengenai pelantikan tersebut; dan (b) GSR telah menunjukkan sikap berat sebelah dan prejudis terhadap kesalahan Najib. Untuk menyokong tuduhan ini, Najib merujuk kepada mesyuarat bahawa GSR (dan seorang lagi peguam bernama JR Tey) dengan MAA di mana GSR didakwa cuba meyakinkan MAA untuk menangkap Najib atas tuduhan penyelewengan dana, rasuah dan penipuan 1MDB. Najib juga bergantung kepada mesej telefon antara MAA dan GSR di mana GSR dikatakan menggunakan istilah 'jenayah Najib'. Sebagai menjawab tuduhan itu, GSR berkata beliau tidak pernah terlibat secara langsung di dalam sebarang siasatan terhadap Najib dan bahawa adalah tidak masuk akal bagi MAA yang ketika itu peguam negara, untuk menangkap seorang PM yang sedang berkuasa pada

ketika itu iaitu Najib. GSR menghujahkan bahawa perkara yang berlaku ketika pertemuannya dengan MAA adalah sebelum beliau dilantik sebagai TPRK dan tidak boleh dikatakan menjejaskan amalan profesionalnya dan ianya tidak menjadikan pihak pendakwaan berat sebelah. GSR menghujahkan bahawa alasan Najib di dalam permohonannya tidak berasas kerana TT yang mengawal keseluruhan proses pendakwaan dan mahkamah yang memastikan bahawa Najib mendapat perbicaraan yang adil. Di dalam menolak permohonan Najib untuk membatalkan perlantikan GSR, hakim Mahkamah Tinggi mendapati: (i) tiada bukti untuk menunjukkan bahawa GSR sebenarnya telah menyiasat kes-kes tersebut yang mana beliau yang membawa kes pendakwaan Najib; (ii) pertemuan antara MAA dan GSR berlaku sebelum GSR dilantik sebagai TPRK dan pendapat yang mungkin dinyatakan oleh GSR mengenai Najib dilakukan secara peribadi; (iii) versi peristiwa GSR tidak memerlukan pengesahan oleh JR Tey; dan (iv) pendakwaan Najib adalah dilakukan oleh pegawai daripada Jabatan Peguam Negara dan bukannya oleh GSR.

**Diputuskan**, menolak rayuan:

(1) Walaupun surat pelantikan GSR dan kenyataan media Jabatan Peguam Negara mengenai pelantikan GSR jelas menunjukkan bahawa GSR terlibat dalam penyiasatan kes-kes 1MDB, tiada keterangan oleh Najib untuk menunjukkan bahawa GSR sebenarnya terlibat dalam siasatan terhadapnya (lihat perenggan 50–51 & 53).

(2) Walaupun perbualan yang dikatakan berlaku antara MAA dan GSR di rumah MAA adalah benar, ianya tidak bermakna bahawa GSR berat sebelah sehingga beliau tidak boleh terlibat dalam proses pendakwaan Najib. GSR mungkin mahu Najib didakwa tetapi tiada apa-apa yang boleh dilakukan ketika itu kerana keputusan untuk mendakwa adalah di tangan peguam negara pada masa itu iaitu MAA. GSR tidak boleh dikatakan sebagai berat sebelah ketika itu. Walaupun benar GSR adalah berat sebelah, hal tersebut tidak relevan kerana GSR bukanlah TPRK pada ketika itu (lihat perenggan 58 & 70).

(3) Mahkamah Tinggi adalah betul ketika memutuskan bahawa GSR berhak mempunyai pendapat peribadinya sendiri mengenai Najib. Selagi pendapat peribadinya tidak menjejaskan tugas awamnya, beliau masih boleh meneruskan proses pendakwaan terhadap Najib. Walaupun GSR masih menganggap Najib sebagai 'penjenayah', persepsinya terhadap Najib tidak akan menjejaskan proses di mahkamah kerana peguam di kedua-dua belah pihak tertakluk kepada penelitian hakim bicara yang akan mengawal sebarang tindakan berat sebelah oleh mana-mana pihak (lihat perenggan 59–60).

(4) Penegasan oleh GSR mengenai versinya mengenai perkara yang berlaku di rumah MAA boleh diteliti secara bebas tanpa memerlukan pengesahan

oleh JR Tey. Hakim Mahkamah Tinggi melakukan perkara tersebut dengan betul dan mendapati bahawa ianya adalah mencukupi untuk versi yang dikemukakan oleh pihak-pihak dalam afidavit masing-masing menurut keadaan kes tersebut. Kecuali jika ditunjukkan bahawa hakim bicara tidak berhak berbuat demikian, tiada alasan untuk mahkamah mengganggu dapatannya (lihat perenggan 62 & 64–65).

(5) Mahkamah bersetuju bahawa permohonan Najib ini bukan penyalahgunaan proses kerana permohonan ini adalah berdasarkan fakta-fakta baru yang tidak diperoleh Najib ketika beliau membuat permohonan sebelum ini untuk membatalkan perlantikan GSR, yang mana ianya ditolak oleh mahkamah sebelum ini (lihat perenggan 67–68).

(6) Najib telah gagal menjustifikasikan sebab GSR harus dibatalkan dari menjadi TPRK. Mahkamah mendapati bahawa GSR tidak pernah terlibat di dalam siasatan terhadap Najib. Ianya juga tidak terbukti bahawa GSR adalah berat sebelah pada masa yang relevan dan walaupun dia berat sebelah sebelum dia dilantik sebagai TPRK, ianya tidak relevan. Najib juga tidak dapat membuktikan bahawa GSR mempunyai kemungkinan berat sebelah terhadapnya pada masa akan datang. Mahkamah tidak berpendapat bahawa GSR tidak boleh menjadi objektif dalam kapasitinya sebagai TPRK dalam menjalankan proses pendakwaan terhadap Najib (lihat perenggan 70).]

**Cases referred to**

*Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL (refd)
*MG v R* [2007] NSWCCA 57, SC (refd)
*PP v Kamaruzaman bin Mahmud & Anor* [2007] 1 MLJ 750, HC (refd)
*R v Parks* [1961] 3 All ER 633 (refd)

**Legislation referred to**

Criminal Procedure Code ss 51A, 376
Evidence Act 1950 s 114(g)
Federal Constitution art 145

**Appeal from**: Criminal Application No W-44–108–06 of 2020 (High Court, Kuala Lumpur)

*Muhammad Shafee Abdullah (Nur Syahirah Hanapiah with him) (Shafee & Co) for the appellant.*
*Gopal Sri Ram (Ahmad Akram bin Gharib Mohamad Mustaffa, P Kunyalam, Nadia Zulkefli and Hazmida Harris Lee with him) (Attorney General's Chambers) for the respondent.*

**Abu Bakar Jais JCA:**

INTRODUCTION

**[1]** The appellant filed a motion at the High Court to essentially challenge one Gopal Sri Ram's appointment as the senior deputy public prosecutor and to disqualify him from that post. The High Court had dismissed the motion.

**[2]** Thereafter, the appellant appealed against that decision of the High Court. We dismissed the appeal and now will give our reasons for doing so.

BACKGROUND FACTS

**[3]** The appellant was the Prime Minister of Malaysia. After the fourteenth general election ('14th GE'), the appellant ceased to hold that office after his political party in an alliance with other political parties, Barisan Nasional, was defeated in the 14th GE. That is not only the event well known. Soon after ceasing being the Prime Minister, a few criminal prosecutions were initiated against the appellant by the public prosecutor cum attorney general.

**[4]** The attorney general ('AG') then that directed or ordered for these prosecutions was one Tommy Thomas ('TT'). He became the AG not long after the appellant was ousted from office, soon after 14th GE, under the new government headed by Tun Mahathir Mohamad ('Tun Mahathir'). TT became the AG for only about two years. He resigned soon after or soon before that government itself collapsed. TT was practising law before being appointed as AG. After his appointment as AG, he then appointed Gopal Sri Ram ('GSR') as the senior deputy public prosecutor ('SDPP'). As SDPP, GSR is entrusted to head the prosecution team to prosecute the appellant.

**[5]** TT issued the letter of appointment as SDPP for GSR. What was stated in this letter by TT, became part of the contention of the appellant that GSR was also involved in the investigation against the appellant, thus disqualifying him from remaining as SDPP. The excerpt of that letter of appointment is as follows:

> Re: 1MDB Prosecution
>
> In the exercise of my discretion under Section 376(3) of the Criminal Procedure Code, I am pleased to appoint you as senior deputy public prosecutor *to spearhead the investigation of numerous fraudulent deals connected with the affairs of the 1Malaysia Development Bhd ('1MDB') Group of companies and the prosecution of the principal personalities responsible for such massive fraud*. (Emphasis added.)

**[6]** As if that is not enough, the AGC under TT had issued a media release, which again highlighted GSR's role in the investigation of 1MDB's cases where

the appellant became the accused. It states as follows:

> 5. It is public knowledge that investigation papers (IPs) into the numerous fraudulent deals connected to the 1MDB affair have not been submitted to Chambers by the MACC and the police (save for one IP concerning Jho Low, which resulted in charges and the issue of warrants of arrest against him and his father last week). Upon receipt of the IPs from the investigating agencies, this office is required to study them, prepare charges and prosecute the alleged accused at trial. *In order to spearhead this entire process, I am pleased to announce the appointment of Datuk Seri Gopal Sri Ram as senior deputy public prosecutor pursuant to* Section 376(3) of the CPC.
>
> 6. Datuk Seri Sri Ram, a retired Federal Court Judge, has returned to active practice. He has substantial experience in criminal law matters. *His strong and determined personality will no doubt enhance the investigation and prosecution in all matters pertaining to the 1MDB scandal.* (Emphasis added.)

**[7]** This also became fodder for the appellant to argue that indeed GSR was assigned for the investigation that would later involve the appellant. This media release was used by the appellant to support his motion for the disqualification of GSR as the SDPP.

**[8]** TT's predecessor as AG was one Mohamed Apandi Ali ('MAA'). MAA became AG when the appellant was the Prime Minister. He ceased becoming the AG when Tun Mahathir ousted the appellant. It is significant to note this because of the meeting between MAA and GSR at the former house before the latter became the SDPP when TT was the AG. MAA and GSR knew each other as they were Federal Court's judges before MAA was appointed as the AG then.

**[9]** MAA revealed in his Facebook's posting that GSR came to his house. MAA said GSR went to his house with one JR Tey, a lawyer. What transpired in this meeting at MAA's house, also became the reason for the appellant to argue that GSR should be removed from remaining as the SDPP.

**[10]** In this meeting, MAA said that he was told by GSR that the latter came to his house as he was sent to see MAA on the instruction of Tun Mahathir.

**[11]** MAA further revealed that according to GSR, there were arrangements already made by Tun Mahathir and GSR to have the appellant arrested and brought to the magistrate. This is to facilitate the remand of the appellant. According to GSR, arrangements have been made with the police and the magistrate to execute this plan.

**[12]** GSR also persuaded MAA that the latter will be seen as a hero in the eyes of the public as he will be the first AG to arrest a sitting Prime Minister. This was also followed with the statement from GSR saying 'Brother, people out

there are frustrated and unhappy, the fact that you arrest, never mind the reason, will make people happy'. GSR said this after MAA asked the former what could be the reasons for the appellant to be arrested.

**[13]** There is also in evidence a telephone message between MAA and GSR where the latter referred the appellant as 'criminal Najib'. This was when the appellant was still the Prime Minister and before he was charged with any offence.

AT THE HIGH COURT

**[14]** The learned HCJ found that GSR was appointed by TT to take conduct of prosecution against personalities allegedly involved in the fraudulent deals of the 1Malaysia Development Bhd group of companies.

**[15]** The learned HCJ also found that there were two main grievances by the appellant regarding the appointment of GSR by TT as the SDPP. First, GSR had been involved in the investigation against the appellant. Second, GSR had prejudged the guilt of the appellant. This was pursuant to the meeting between GSR with MAA.

**[16]** The learned HCJ found that GSR was not involved in the investigation of the cases where he was to lead the prosecution of the same. This is despite the media release by the AGC and the letter of appointment ('LOA') for GSR signed by TT. In the media release, it was clearly stated that GSR will no doubt enhance the investigation in all matters pertaining to the 1MDB scandal. While in the LOA, it was unequivocally stated by TT that he was pleased to appoint GSR as SDPP to spearhead the investigation of numerous fraudulent deals connected with the affairs of 1MDB.

**[17]** The learned HCJ said TT statements and the contents of the LOA signed by TT also indicated that GSR is to be involved in the investigations. The learned HCJ said it was a poor choice of words by TT and perhaps the LOA could have been better drafted.

**[18]** However, the learned HCJ believed the words of GSR that he was not involved in the investigations of the cases where he was supposed to prosecute. This is what the learned HCJ said:

> I find no reason to doubt his denial, as there is no convincing evidence proffered by the applicant to suggest otherwise.

**[19]** The learned HCJ went further in believing GSR. This is in respect of GSR's version as to what transpired when he met MAA at the latter house. The

learned HCJ said:

> I do not think that GSR needed to have his averments corroborated by J.R Tey.

**[20]** Yet in another instance, the learned HCJ went further to accept GSR's evidence. The learned HCJ said GSR was at liberty to express his opinion privately as opposed to the facts of an Australian case in *MG v R* [2007] NSWCCA 57. The learned HCJ differentiated this Australian case with this case before him. In this Australian case, the Crown Prosecutor had publicly expressed her sympathy towards the victim of the crime. She also had expressed her frustration publicly that the criminal justice system weighed favourably towards the accused persons. This was not similar to the conduct of GSR according to the learned HCJ. GSR had only expressed his opinion privately and not publicly. This was what the learned HCJ said in agreeing with what GSR had done:

> GSR was like any other person is entitled to have his personal opinion ... He, like any other person, is entitled to form his own opinion, provided that his view is not made public ...

**[21]** In addition to the above, the learned HCJ also found that the meeting between GSR and MAA took place before GSR was appointed as the SDPP. The learned HCJ found that had it been after GSR's appointment, the appellant's contentions would have more force.

**[22]** The learned HCJ also found that GSR was not alone in handling the prosecution of the appellant. The learned HCJ said:

> It would great disservice to the Attorney General's Chambers and its officers to suggest that GSR alone have absolute control over the prosecution ... and could manipulate the conduct of the prosecution's case to fit his agenda ...

**[23]** Hence, with the findings of the learned HCJ as stated, he had refused the application of the appellant to remove GSR as the SDPP.

## SUMMARY OF THE APPELLANT'S CONTENTIONS

**[24]** The crux of the appellant's submission before us was that GSR was involved in the investigation against the appellant for the cases where he has been prosecuted. These prosecutions led by GSR were and still are unlawful. GSR should be disqualified from remaining as SDPP as he should not also be involved in the investigation of these cases against the appellant.

**[25]** There was an earlier application made by the appellant to disqualify GSR as SDPP which went right up to the Federal Court ('FC'). This application was also dismissed. However, at the FC, a copy of the LOA of GSR

as SDPP was ordered to be given to the appellant. Thus, that was the first time the appellant had sight of this LOA. Prior to this, despite repeated requests of the appellant to the respondent, the latter had refused to hand over the LOA.

**[26]** In the previous application to disqualified GSR, it was argued by respondent that GSR was never involved in any investigation. However, the LOA was obtained much later by the appellant (only when the FC ordered that LOA to be given to the appellant), revealed the contrary. In this LOA it is clearly stated that GSR was supposed to be involved in the investigation against 1MDB's cases that turned out to implicate the appellant.

**[27]** In the High Court, the appellant had relied on four grounds to disqualify GSR as follows:

(a) issue on GSR's letter of appointment;

(b) GSR displayed biasness and non-objectivity;

(c) no corroboration by JR Tey on GSR's version of events; and

(d) not an abuse of process.

**[28]** It was contended that the learned HCJ wrongly decided the above issues and dismissed the application of the appellant. The learned HCJ had failed to appreciate the submissions of the appellant regarding these grounds to disqualify GSR.

**[29]** With regard to the first ground above, the LOA for GSR clearly stated the role of GSR in the investigation of the cases for the prosecution of the appellant. The LOA expressly provided that GSR is to supervise investigation and prosecution of 1 MDB's cases and where the appellant became the accused. This is clearly a case of conflict of interest and function by GSR. Article 145 of the Federal Constitution on the scope of the AG's duties does not allow for supervision of investigation and the investigation itself. Similarly, s 376 of the Criminal Procedure Code supports the contention of the appellant that investigation could not be within the purview of the appointment of GSR.

**[30]** Thus, it was contended that the learned HCJ erred in interpreting the LOA in favour of GSR despite the clear words in the same that indicated GSR was supposed to be involved in investigation.

**[31]** It was also argued that the learned HCJ failed to appreciate that when this case came before him, the appellant had only been given a copy of the LOA at that point of time. The appellant did not have this LOA prior to appearing before the learned HCJ. Yet the HCJ erroneously found what was stated in this LOA had been decided up to the Federal Court.

**[32]** It was further contended that what was revealed by MAA also supports the contention that GSR was very much involved in the investigation against the appellant. GSR could not possibly act independently and in a neutral fashion as he is bent on persecuting and not prosecuting the appellant. This is reflected by his conduct when he met MAA in his house. This is further evident when GSR referred the appellant as 'criminal Najib' in his telephone message to MAA. In the telephone message, GSR also said monies found in the appellant's account was sufficient to charge him. GSR had prejudged the guilt of the appellant as shown by what he had said to GSR. As a prosecutor, GSR must not be partial in any manner but to act in finding the truth for the court, although this might mean a prosecution which is unsuccessful against anyone. Instead GSR was biased against the appellant.

**[33]** GSR has not denied what MAA said transpired when they met. JR Tey who came with GSR to MAA's house also has not affirmed an affidavit to deny the version of events by MAA. The learned HCJ erred in not requiring corroboration on the assertion of GSR as to his version of what had happened at MAA's house.

**[34]** What GSR said to MAA reflected his attitude and approach with regard to the appellant. This is not a privately held view damaging on the appellant but showed and proved his bias and partisan mind against the appellant. There is no professional detachment in prosecuting the appellant.

**[35]** Although there was similar application to disqualify GSR prior to this, the present application is based on new facts arising from the revelations made by MAA. The appellant could not be said to abuse the process of the court in the present application as the same is now premised on new facts unavailable earlier.

SUMMARY OF THE RESPONDENT'S CONTENTIONS

**[36]** In his affidavit, GSR denied what was said against him by MAA. GSR said he went to MAA's house and rendered professional advice which was protected by professional privilege and thus could not be revealed.

**[37]** GSR denied he was sent to meet MAA by Tun Mahathir. It is absurd to suggest that GSR told MAA who was then the AG to arrest the appellant who was the sitting Prime Minister. Tun Mahathir then was not the Prime Minister. He could not have instructed GSR to see MAA for this purpose.

**[38]** What was revealed by MAA on his meeting with GSR and the telephone message between the two, had not tainted the professional conduct

of the latter in prosecuting the appellant. The telephone message showed that GSR was only trying to console MAA who was worried he might lose his vocation as the AG.

**[39]** What transpired between GSR and MAA was before GSR was appointed as the SDPP. GSR had no role as SDPP then. He could not in any manner determine and influence the conduct of the prosecution against the appellant. He could not be biased at that stage. He was entitled to express his opinion privately to MAA.

**[40]** GSR was never involved directly with the investigation of the case against the appellant. It was TT as the AG that decided to prosecute the appellant and GSR was merely the SDPP who headed the prosecution's team in the prosecution of the appellant.

**[41]** The appellant had not proven in any manner that GSR was actually involved in the investigation against the appellant.

**[42]** GSR was not biased and had always acted objectively in prosecuting the appellant. The revelation by MAA could not mean real bias on the part of GSR. It was only the opinion and conjecture of MAA that GSR was always bias towards the appellant.

**[43]** Instead it was MAA who was always biased in favour of the appellant as he was appointed by the latter when he was the Prime Minister. MAA even held a news conference to say there is no evidence against the appellant in respect of the 1MDB's cases against him.

**[44]** The court and not GSR is to ensure that the appellant gets a fair hearing in the prosecution against him. GSR alleged bias towards the appellant ultimately means nothing as that alleged bias could not influence the court in its decision.

**[45]** Acting as the SDPP, GSR is still under the supervision of TT as the AG. GSR could not act in prosecuting the appellant without this direct control of TT. GSR is not at liberty to prosecute in whatever fashion he likes. This means the appellant's apprehension of the alleged bias of GSR is unfounded.

OUR DECISION

**[46]** The first relevant issue is whether the LOA of GSR as SDPP indicates that he is to be involved in the investigation of the 1MDB's cases which in turn involved the appellant. In this regard, it is crystal clear his duties as SDPP

include to be engaged in the investigation if one looks at this LOA, as shown above. With respect, it is clearly dishonest to say otherwise, based on this LOA.

**[47]** It is puzzling why the LOA had been worded in this manner. In fact, for those who are familiar with the workings of previous AGs who had experienced some good years at the AGC before becoming AG, such LOA was never issued. At least not worded in the manner it is worded here. In fact, what were issued instead in those days were a simple 'Fiat'. And in the Fiat, it is explained a person is simply appointed as a deputy public prosecutor without much elaboration, at least not as shown in this LOA now. The wisdom and practical working experience of those AGs guided them in good stead probably to note the lesser said, the better. After all, even the learned HCJ in this case had commented there was a poor choice of words and perhaps the LOA could have been better drafted.

**[48]** Moving on to the media release by AGC, again as can be seen above, it is clear that investigation is part of the main duties of GSR as SDPP as stated in this media release. One could not escape this conclusion having regard to the unambiguous media release. It is with respect ingenious but completely fallacious to argue the media release does not mean that GSR is to be involved in the investigation against the appellant. The words of the media release are on the contrary clear for anyone to note the scope of work for GSR as SDPP. It states in no uncertain terms that duties include investigation.

**[49]** Again, it begs the question whether such media release was necessary in the first place. In any event, since it had been released, GSR and AGC need to answer the questions arising from such media release.

**[50]** As stated the LOA and media release both clearly indicate that GSR is to be involved with the investigation of the 1MDB's cases and this subsequently has involved the appellant as an accused. The clear words in these two documents could not be disputed and the House of Lords case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 is relevant in this regard where it states as follows:

> The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one were to nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention, which they plainly not have had.

**[51]** However, what is still relevant to note is whether there is credible evidence to suggest that GSR was indeed involved in the investigation against the appellant. On this note, it was never shown and proven by the appellant

A that GSR was actually involved in the investigation against him. There is no palpable substance or evidence to suggest that GSR participated in the investigation. The LOA and media release stated that GSR also has a duty to investigate. However, at the end of the day, factually there is still no concrete evidence to suggest GSR was not only confined to prosecuting the appellant but had gone on to investigate the former Prime Minister. The LOA and media release may say one thing but the reality on the ground does not support what had been stated in both.

C **[52]** The LOA and media release had not assisted GSR and AGC but instead became a bane for both. That was why this LOA was not shown and the respondent keenly kept it away from the appellant despite been requested to produce the same. As a result, only after the FC ordered a copy of the LOA to be supplied, did the respondent give the same to the appellant. Why was the respondent so reluctant to show this LOA and waited till the last minute to do the same? This is because the respondent was fully aware the LOA could be damaging to them by the words it had used, hence the all-out attempt to conceal it from the appellant.

E **[53]** In any event, although both the LOA and media release could have been better worded and despite the concerted effort by the respondent to shield the LOA from the appellant, the fact remains we could not find tangible evidence to indicate indeed GSR was involved in the investigation against the appellant.

F **[54]** It should also be noted that as a SDPP, the most that can be done by GSR in respect of investigation is to request that the relevant investigating agencies (eg police, MACC, customs and the likes) do carry out further investigation on a particular matter. For instance, if a recorded statement of a witness is considered insufficient, he may request the investigating agencies to meet the witness again and record further statement of the witness. This is acceptable practice of a prosecutor. However, in any event, he is not involved in the real investigation itself. For example, he does not meet the witness personally with his pen and paper or his computer to physically record the witness's statement. He too will not personally visit a bank for instance, to get a document for the 1MDB's case in preparation for the prosecution against the appellant. That is not GSR's role no matter how much the public may want to see that spectacle or no matter how much he may wish personally to be involved. That is the function of the investigating officer.

I **[55]** Thus, GSR's position in this regard is very much different from the facts as in *Public Prosecutor v Kamaruzaman bin Mahmud & Anor* [2007] 1 MLJ 750 where it was found as follows:

> [22] In the course of reading the notes of proceedings in the record of appeal, this court also discovered another irregularity in the proceedings at the lower court. The

officer who recorded the cautioned statement of the first accused was also the prosecuting officer right from the beginning in the instant case at the magistrate's court. The prosecuting officer had in fact earlier applied to the learned magistrate to recuse himself as the prosecuting officer as early as 9 February 2001 as he had recorded the cautioned statement of the first accused and had informed the court that another officer will be conducting the prosecution. However, this court found from the notes of proceedings that the said prosecuting officer still continued to attend court as the prosecuting officer on all the eleven subsequent dates fixed for hearing of the case. On 9 December 2004 where both accused had pleaded guilty to the charge, the prosecuting officer had also prepared the facts of the case, signed it and tendered it to the court on 10 December 2004 and continued to be the prosecuting officer until the conclusion of the case.

**[56]** As opposed to the above facts, there is no evidence that GSR recorded the statements of any witnesses as SDPP. Only if the appellant could show the evidence that GSR acted in the same manner as in the above case, the latter should not be removed as SDPP. Unfortunately, there is no such evidence before us.

**[57]** Moving on to the issue whether GSR was biased against the appellant and as a result could not be objective in prosecuting the latter, first this allegation came because of the conversation between MAA and GSR and what the latter wrote in his telephone message.

**[58]** The alleged conversation, even if it is true between the two at MAA's house does not mean that GSR was biased to the point that he could not be objective in prosecuting the appellant. Even if it is true that he said he came on the instruction of Tun Mahathir to tell MAA to prosecute the appellant, this could not mean GSR was damagingly biased on the appellant. He may want the appellant to be prosecuted but there was nothing much he could do at that point of time because he was not appointed to lead the prosecution then. He could only wish but the prosecution of the appellant if was to be, was still very much in the hands of MAA as the then AG. It was pointless for GSR to be biased then. Even if he was biased, there was nothing much he could do. Of course, if such conversation did take place, one wonders what was the real purpose for GSR to convey what he said to MAA and one could only fathom whether such visit and conversation was necessary after all. If the conversation happened as MAA said, it is indeed strange that a man of GSR's calibre could be so brazen and gung-ho in his conduct then.

**[59]** In any event, we are of the considered view that the learned HCJ correctly noted that GSR was entitled to have his own private opinion on the case against the appellant. As long as his private opinion is not in the public sphere, this would not infringe his public duty in prosecuting the appellant. Thus, the learned HCJ was not wrong in distinguishing the Australian case of

A *MG v R* with the present case.

**[60]** Even if it is true that ever since the meeting between MAA and GSR, it was evident the latter had this bias and the same is still sustained even now as SDPP, the fact remains the prosecution of the appellant is undertaken in court. There are rules to be followed in a court of law. Both the prosecution and defence are always under the control and supervision of the judge, who in turn is bound by these rules and law. Any attempt to exercise whatever biasness (no matter how wide that term might be) by counsels on both sides of the aisle, will be met with close scrutiny of the judge to stem any element of such bias. Thus, though GSR might still now consider the appellant as 'criminal Najib', his perception of the appellant will not carry him much distance in court. Neither would GSR's statement to MAA that monies found in the appellant's account was sufficient to charge him mean much to a judge as this unsolicited opinion must first translate to evidence in court.

**[61]** Nonetheless GSR's reference to the appellant as 'criminal Najib' turned out to be true with the conviction of the latter in the SRC's case recently. Though others may say the appellant has still the right to appeal to FC on this case and the FC may well exonerate him eventually, the fact remains, at least for now, the appellant is already convicted in a court of law. The prophecy of GSR seems fitting on hindsight.

**[62]** Regarding the absence of corroboration by JR Tey for GSR, we do not think this is fatal. The assertion by GSR on his version of what transpired at MAA's house could be independently assessed and evaluated without the need for JR Tey's to corroborate GSR's affidavit.

**[63]** In this regard, the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 is relevant where it states as follows:

> Where the evidence of a witness does not require to be corroborated in law there is no obligation to tender corroborative evidence to support his testimony. Thus, if the case for the prosecution rests solely on the evidence of one witness in such a category there is no requirement in law for his evidence to be corroborated. Any such requirement will conflict with s 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This means that the testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457; [1998] 1 LNS 340).

**[64]** Even if GSR's affidavit is uncorroborated, the High Court could still make an evaluation on the version of events according to MAA and the High Court has precisely done so. What GSR said to MAA may well be true. He may

have informed MAA that he came to see the latter on the instruction of Tun Mahathir to charge the appellant. He may also have said there was sufficient evidence to charge the appellant. He too had referred to the appellant as 'criminal Najib'. Despite all these, the learned HCJ correctly found that GSR has not been appointed as the SDPP then. The learned HCJ also correctly found that GSR was not involved in the investigation and he gave his reasons in making this finding as narrated earlier. All these could be done by the learned HCJ by assessing and evaluating MAA's affidavit. Unless it can be shown that the learned HCJ is not entitled to do this, there would be no reasons to disturb his findings. Hence, although JR Tey did not corroborate GSR, this does not mean the learned HCJ was wrong in his findings as above.

**[65]** We also agree with the finding of the learned HCJ who said as follows in his grounds of judgment:

> I do not think that GSR needed to have his averments corroborated by JR Tey. Quantity does not make for veracity. It would suffice for the versions put by parties in their affidavits to be analysed with the circumstances of the case.

**[66]** Further, on the insinuation that GSR could conceal favourable evidence for the appellant, this at best remains an apprehension unsupported by any evidence. It is also beyond imagination that GSR acting as the SDPP would want to risk his reputation by even harbouring that thought, let alone executing that imprudent act. Neither is it conceivable that GSR would fail in his duty of disclosure whenever it is necessary to do that in the course of prosecuting the appellant. One would think the AGC would have sufficient evidence before prosecuting anyone including the appellant. Thus, there is no reason to resort to unsavoury conduct in discharging that duty including to supress favourable evidence for an accused. In fact, there are provisions under the Criminal Procedure Code (Act 593) and Evidence Act 1950 (Act 56) as a safeguard against such conduct ie s 51A and s 114(g), respectively. If this unfounded allegation could be hurled against GSR, there is no hindrance that the same allegation could be thrown against other deputy public prosecutors from AGC who time and again have been proven to perform their duties with utmost integrity and professionalism.

**[67]** The appellant also argued that his motion filed at the High Court is not an abuse of process despite similar application previously to remove GSR was dismissed by the court.

**[68]** We agree that the present application is based on new facts and therefore should not be considered as an abuse of process. The present application is premised on what MAA revealed against GSR, which was not available to the appellant in his previous application.

**[69]** Therefore, rightly the four requirements as laid down in the English case of *R v Parks* [1961] 3 All ER 633 would apply for the appellant to bring the present motion for argument and he should not be prevented the hearing of the same despite having a similar application filed, heard and disposed of earlier. The four conditions as stated in this case are as follows:

> Firstly, the evidence that is sought to be called must be evidence which was not available at the trial.
>
> Secondly, it must be evidence relevant to the issues.
>
> Thirdly, it must be evidence which is credible in the sense that it is well capable of belief.
>
> Fourthly, the court will after considering the evidence go on to consider whether there might have been reasonable doubt in the minds of the Jury as to the guilt of the accused person if that evidence had been given together with the other evidence at the trial.

**[70]** However, despite meeting the four conditions as narrated above, based on the reasons we have given, GSR was never involved in the investigation against the appellant. It is also not proven by the appellant that GSR was biased at the relevant point of time. He could be biased before he was appointed as the SDPP but this obviously is irrelevant. Neither could the appellant prove that GSR has the possibility of being biased against the former in future. We also do not think that GSR could not be objective in his capacity as the SDPP in the prosecution of the appellant. In essence, despite meeting the four requirements for the present motion to be heard and decided, the appellant fundamentally has not been able to justify the removal of GSR as the SDPP.

CONCLUSION

**[71]** Based on all the reasons that have been explained, we could not find sufficient merits in this appeal. There is also no reason for us to reverse the decision of the learned HCJ. Accordingly, we are unanimous in dismissing this appeal.

*Appeal dismissed.*

Reported by Ashok Kumar